37,305

DETERMINATION OF JURISDICTION
CERTIORARI
MONDAY, MAY 6, 1968

IN THE SUPREME COURT OF FLORIDA

JEFFERSON REALTY OF FORT LAUDERDALE, INC., a Florida corporation; JEFFERSON REALTY OF SOUTH DADE, INC., a Florida corporation; JEFFERSON FUNLAND, INC., a Florida corporation; and JEFFERSON STORES, INC., a Delaware corporation authorized to do business in the State of Florida,	NO._____
Petitioners,	PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
vs.	
UNITED STATES RUBBER COMPANY, a New Jersey corporation,	
Respondent.	

Rehearing granted and case was set for argument

FILED
APR 18 1968
SID J. WHITE
CLERK SUPREME COURT
By [signature]
Chief Deputy Clerk

GRANT	DENY

TO: THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioners, JEFFERSON REALTY OF FORT LAUDERDALE, INC., a Florida corporation, JEFFERSON REALTY OF SOUTH DADE, INC., a Florida corporation, JEFFERSON FUNLAND, INC., a Florida corporation, and JEFFERSON STORES, INC., a Delaware corporation authorized to do business in the State of Florida, by and through their undersigned attorneys, hereby exhibit and present their Petition for Writ of Certiorari and state:

1. Petitioners seek to have reviewed that certain decision of the District Court of Appeal, Third District, dated the 21st day of February, 1968, and filed in the records of said District Court of Appeal, Third District on the 21st day of February, 1968 in Minute Book 25, Page 101; and to which a timely Petition for Rehearing was directed and filed, which Petition for Rehearing was

denied by that certain decision of the District Court of Appeal, Third District, dated the 3rd day of April, 1968 and filed in the records of said District Court on the 3rd day of April, 1968 in Minute Book 25 at Page 280.

2. This Petition is presented under and pursuant to Article 5, Section IV.(2) of the Florida Constitution and Rule 4.5(c) of the Florida Appellate Rules.

3. This Petition is accompanied by a conformed transcript of those portions of the record as deemed necessary to show jurisdiction in the Supreme Court of Florida, including the Opinion evidencing the decision Petitioners seek to have reviewed.

4. The following are the facts in the case:

A. For purposes of clarity, the Respondent herein will be referred to as "U. S. RUBBER". The Petitioners, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC., and JEFFERSON FUNLAND, INC., will be referred to as "JEFFERSON'S SUBSIDIARIES". The Petitioner, JEFFERSON STORES, INC., will be referred to as "JEFFERSON PARENT CORPORATION". The symbol "R" will be used to designate Record, and the symbol "T" will be used to designate that portion of the record constituting the Transcript of Testimony. "PX" will symbolize Plaintiff's Exhibit.

B. In approximately August, 1962, one GEORGE KAMENS contacted JEFFERSON PARENT CORPORATION with regard to the possibility of establishing automotive

centers at the locations of three Jefferson Stores in Dade and Broward Counties (R 1280, 1743-1745, 1299). The record is clear that KAMENS was acting as an agent of U. S. RUBBER (R 1299). KAMENS, after this initial contact, then presented the proposals to U. S. RUBBER (R 1745, 1751-1752) and negotiations were then undertaken directly by U. S. RUBBER with JEFFERSON PARENT CORPORATION (R 210-214, 1310-1313, 1753). Negotiations between JEFFERSON PARENT CORPORATION and U. S. RUBBER resulted in the execution of Lease Agreements between U. S. RUBBER and JEFFERSON'S SUBSIDIARIES (which were wholly owned by JEFFERSON PARENT CORPORATION) (R 194, 195, 52, 92, 132) (PX 1, 2, 3). The record is clear that all of the corporations, i.e, JEFFERSON PARENT CORPORATION and JEFFERSON'S SUBSIDIARIES, were treated as one party in its dealings with U. S. RUBBER and,in fact, the officers and directors of JEFFERSON PARENT CORPORATION and JEFFERSON'S SUBSIDIARIES were identical (R 349, 2034), (T 801). In addition to the fixed rental required under the Leases (PX 1, 2, 3), payment of an additional five (5%) per cent of U. S. RUBBER's gross sales from the leased premises during each month, to the extent that it exceeded the guaranteed minimum rental, was required (R 69). The Leases also required that

U. S. RUBBER spend three (3%) per cent of its gross sales on advertising to beconducted under the name of the JEFFERSON PARENT CORPORATION (R 83, 97). The Leases were not to become effective until U. S. RUBBER was furnished with appropriate guarantees from JEFFERSON PARENT CORPORATION and received and approved satisfactory title reports (R 194, 195).

C. When it became apparent that U. S. RUBBER suffered a change of heart and did not intend to fulfill its obligations under these Leases, suit was instituted for damages against U. S. RUBBER with the parties Plaintiffs being JEFFERSON'S SUBSIDIARIES. These original Plaintiffs, JEFFERSON'S SUBSIDIARIES, were awarded partial summary judgment in their favor on the issue of liability and the Court ordered trial on the issue of damages alone.

When the cause came to trial on the issue of damages alone, the evidence revealed that the real party in interest was JEFFERSON PARENT CORPORATION rather than JEFFERSON'S SUBSIDIARIES. Before the Plaintiffs rested their case,the Motion to add JEFFERSON PARENT CORPORATION as a party and to amend the pleadings to conform with the evidence was made (T 480-481). The Trial Judge immediately indicated that the Motion would be granted but he wanted to see some law (T 640). On the last day of trial, the Motion was formally granted (T 784).

The Trial Judge presented the Jury with four verdicts, three for each of JEFFERSON'S SUBSIDIARIES, and one for JEFFERSON PARENT CORPORATION. The Jury returned a verdict of $400,000.00 in favor of JEFFERSON PARENT CORPORATION, the real party in interest, and found that JEFFERSON'S SUBSIDIARIES suffered no independent damages.

In a Post Trial Order, the Trial Judge clearly explained his position as to JEFFERSON PARENT CORPORATION being the real party in interest (R 349). Because of the significance of this Post Trial Order, a true copy of said Order is attached to this Petition (Exhibit A).

Only one Judgment was entered on the verdicts (R 2048). That Judgment was appealed from by U. S. RUBBER (R 2050) and resulted in the District Court of Appeal, Third District, reversing the Trial Court.

D. U. S. RUBBER in its appeal assigned thirty-five (35) Assignments of Error. Only two of these Assignments of Error dealt with the Post Trial Order attached to this Petition (Exhibit A). They are:

> "33. The court erred in denying defendant's Motion for Entry of Final Judgment by Order entered November 7, 1966.
>
> 34. The court erred in making Findings and conclusions in its Order denying defendant's

Motion for Entry of Final Judgment entered November 7, 1966."

In its Brief, Appellant argued three (3) points, to-wit:

"POINT ONE

WHETHER THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY, THEREBY ADJUDICATING THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES, DESPITE THE NON-PERFORMANCE OF AN EXPRESS CONDITION PRECEDENT BY THE PLAINTIFFS.

(Raised by Assignment of Error No. 1, 2, 3)

POINT TWO

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JOINDER OF A NEW PARTY PLAINTIFF AFTER ALL ORIGINAL PARTIES HAD RESTED THEIR RESPECTIVE CASES DURING THE TRIAL OF THE CAUSE.

(Raised by Assignment of Error No. 10, 11, 17, 18, 19, 30, 32, 35)

POINT THREE

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER AND RETURN A VERDICT FOR DAMAGES PREDICATED ON INCOME AND SALES TO BE DERIVED FROM BUSINESS WHOLLY IN CONTEMPLATION AND PROSPECT AND WITHOUT ANY EVIDENCE OF FAIR RENTAL VALUE.

(Raised by Assignment of Error No. 4, 5, 6, 7, 8, 9, 12, 13, 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32)"

At no point did the Appellant argue the validity of the Trial Court's Post Trial Order. It should be noted that none of the above points on appeal addressed themselves to the Appellant's own Assignments of Error Nos. 33 and 34 quoted above;

accordingly, the Appelleesin their Brief did not address themselves to that point. Despite the foregoing, the District Court of Appeal, Third District, saw fit to reverse said Post Trial Order.

B. Because of the significance of this Post Trial Order, in the Statement of Facts of this cause, its full text is set forth below:

(Caption Omitted)

"ORDER DENYING DEFENDANT'S MOTION FOR ENTRY OF FINAL JUDGMENTS

THIS CAUSE coming on to be heard upon the Motion of the Defendant, UNITED STATES RUBBER COMPANY, to enter Final Judgments on Jury verdicts in accordance with the forms of Final Judgments annexed to said Motion, and the Court having heard argument of Counsel and being fully advised in the premises, the Court

CONCLUDES as follows:

1. That the granting of said Motion would create the erroneous impression that the defendant had won the law suit.

2. It is undisputed that the three original plaintiffs, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. were wholly owned subsidiaries of the added plaintiff, JEFFERSON STORES, INC., which was the parent corporation. The relationship between the parent and the subsidiaries were shown not to be one of stock ownership alone since the three subsidiaries, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC., and JEFFERSON FUNLAND, INC. were run by the parent corporation, JEFFERSON STORES, INC. in accordance with the parent's policies and objectives. Throughout this entire transaction, all parties concerned recognized that

JEFFERSON STORES, INC. was the main party in interest with the original plaintiffs, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC., and JEFFERSON FUNLAND, INC., being nothing more than nominal parties to the transaction. The lease and other evidence in this cause indicates this to be the case, but this is manifested most strongly in the four verdicts of the Jury, wherein JEFFERSON STORES, INC. was awarded the sum of FOUR HUNDRED THOUSAND and 00/100 ($400,000.00) DOLLARS, while the three subsidiary corporations, JEFFERSON REALTY OF FORT LAUDERDALE, INC., JEFFERSON REALTY OF SOUTH DADE, INC. and JEFFERSON FUNLAND, INC. were awarded no damages. There is not the slightest suggestion throughout this cause that the defendant was deceived or suffered any injury by reason of the fact that JEFFERSON STORES, INC., the real party Complainant was doing business through three wholly owned subsidiary corporations. To the contrary, the evidence indicates that the subsidiaries were mere instrumentalities of the parent corporation, and it is thereupon

ORDERED, ADJUDGED AND DECREED, that:

1. Defendant's Motion for entry of Final Judgment on Jury verdicts in accordance with the forms annexed to said Motion be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 7 day of November, 1966.

/s/ HAROLD R. VANN
JUDGE OF THE CIRCUIT COURT"

(R 349).

5. On the foregoing facts, the District Court was squarely presented with the following two points of law:

A. Whether or not it was proper to add JEFFERSON PARENT CORPORATION as a party plaintiff during the course of the trial.

B. Whether or not it was proper for the District Court to reverse the Lower Court's Post Trial Order when the validity of said Order was never argued by Appellant in its Brief.

On these points of law, the District Court of Appeal, Third District, rendered the following holdings:

A. "Assuming that the Realty Corporations were entitled to a summary judgment, the jury must have found that they had not proven any damage to themselves and that the damages, if any, from the defendants' alleged breach of the lease agreements related to a non-party to the cause, Jefferson Stores.

The court by permitting the entry of Jefferson Stores into the case on the last day of testimony and by permitting it to go to the jury as a party plaintiff, adjudicated liability in favor of Jefferson Stores and against U. S. Rubber without any hearing on that question as between these parties. The court necessarily granted Jefferson Stores a partial summary judgment after all of the evidence was received even though summary judgments are properly pre-trial in character and it is not proper to grant summary judgments in favor of either party at the conclusion of the evidence during trial. Accordingly, it was error for the trial court to enter summary judgment without previous notice under the rules."

B. "Counsel for appellees having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied."

6. The same point of law (set forth in Paragraph 5.A. above) was directly involved in the following cases which are attached hereto and made a part hereof as though fully incorporated herein:

A. Robert L. Weed, Architect, Inc. vs Horning (Fla. 1947) 33 So 2d 648 wherein the Court held the

following:

> "As to the first contention we find no support whatever. It is quite true that under the law a corporation cannot be licensed to practice architecture, but Robert L. Weed, Architect, Inc., was nothing more than the alter ego of Robert L. Weed or a medium through which his business as an architect was transacted. The bill of complaint alleges that Robert L. Weed was at all times a licensed architect, that as such he performed the services in question and that the contract was executed by Robert L. Weed, Architect, Inc., for the benefit of Robert L. Weed. Throughout the entire transaction both parties recognized Robert L. Weed as the main party in interest, and that Robert L. Weed, Architect, Inc. was nothing more than a nominal party to the transaction."

and in Miracle House Corporation v. Haige, Fla. 1957, 96 So. 2d 417, wherein the Court held that:

> "The aim of the rules of civil procedure is to allow liberal joinder of parties."

and in direct conflict with well established principles promulgated by the Supreme Court of Florida such as First National Bank vs Perkins, 81 Fla. 341, 87 So. 912, wherein the Court held:

> "The purpose of the statutory provision that 'any civil action at law may be maintained in the name of the real party in interest' is to relax the strict rules of the common law so as to enable those directly interested in, but not parties to, a contract, to maintain an action for its breach; and the statute should be so applied as to accomplish its salutary purpose."

and also McCord vs Lee, 127 Fla. 65, 172 So. 853, wherein Chief Justice Ellis held:

> "The statute law of this state recognizes the principle as applicable to civil actions at law providing that the real party in interest may at all times be substituted for the person who brings the action for the use of another." (emphasis supplied)

For numerous other conflicting opinions directly contrary to the Opinion of the District Court of Appeal, Third District, this Honorable Court is respectfully referred to Petitioners' Brief accompanying this Petition.

7. The same point of law (set forth in 5. B. above) was directly involved in the following case which is attached hereto and made a part hereof as though fully incorporated herein:

A. Redditt vs State (Fla. 1955) 84 So. 2d 317 at 320 wherein the Supreme Court of Florida held the following:

> "The new Rule of this Court in Rule 36 (9), 30 F.S.A., has re-stated a well established rule of law of appellate review as follows: 'Such assignments of error as are not argued in the briefs will be deemed abandoned * * *.' The assignment of errors constitute the basis for reversal and appellant's brief serves the purpose of pointing out specific errors or points within the scope of some specific assignment of error. Except for fundamental errors, an appellate court will not reverse except for some well founded assignment of error that has been argued in the brief, and no point made in the brief will be considered unless it is found to be within the scope of an assignment of error."

Petitioners further allege that it is not their intention to convert this Petition into a brief; therefore, the Court's attention is respectfully called to the Brief filed by the Petitioners.

8. The Court was also presented with the following point of law:

What is the landlord's measure of damages when a tenant breaches a lease.

On this point of law the District Court of Appeal, Third District, rendered the following decision or holding:

> "It was plaintiff's burden to prove each of the elements of damage. Without evidence of rental value, there was nothing before the jury from which they could determine the rent reserved and rental value."

The same point of law was involved in the following cases:

A. Moses v. Autuono, 56 Fla. 499, 47 So. 925 (1908), was a suit by a tenant against the landlord for breaching an agreement to build a building and lease it to the tenant. On these facts the Court held that "the measure

of damages is the difference between the stipulated rent and the value of the use of the premises."

B. Young v. Cobb, Fla. 1955, 83 So.2d 417, was a suit by a tenant against the landlord for damages sustained for an unlawful eviction. The trial judge had held that the plaintiff could only recover for the difference between the market value of the lease and the rent that was payable under it. On these facts the court held that this was not the test and Justice Roberts, speaking for the court, held that damages could be recovered by the tenant "even though the market value of the leasehold is considerably less than the rent contracted to be paid by him."

9. The decision of the District Court of Appeal, Third District, which Petitioners seek to have reviewed is in direct conflict with prior decisions of the Supreme Court of Florida. Because of the reasons and authorities set forth in Petitioners' Brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the conflicting decisions of the Supreme Court of Florida are correct and should be approved and again ratified by this Court as the controlling law of the State of Florida.

WHEREFORE, Petitioners request this Court to grant a Writ of Certiorari and enter its Order quashing the decision and Order hereby sought to be reviewed, approving the decisions of the Supreme Court of Florida, as the correct decisions, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

BERNARD C. FULLER and
FRATES FAY FLOYD & PEARSON
Twelfth Floor Concord Building
Miami, Florida 33130

By Ray H. Pearson

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the District Court of Appeal, Third District, was mailed this 17th day of April, 1968 to:

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
Attorneys for Respondent
501 City National Bank Building
Miami, Florida 33131

Attention: Richard S. Banick, Esq.

By Ray H. Pearson